(1)

Supreme Court, U.S.
FILED

No. 04 925 JAN 5 - 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT KYE STURDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARCIA J. SILVERS
Counsel of Record for Petitioner
DUNLAP & SILVERS, P.A.
Suite 601
2601 South Bayshore Drive
Miami, Florida 33133
305/854-9666

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a defendant in a criminal case who does not object at trial to his counsel preventing him from testifying waives his Fifth and Sixth Amendment right to testify in his own defense, as has been held by the Fourth, Eighth and Ninth Circuits; or instead cannot be deemed to have waived his right to testify by merely being silent as has been held by the Second, Fifth, Seventh, Eleventh and D.C. Circuits?

2. Whether the rejection of a valid legal claim asserted in the Petitioner's *pro se* motion under 28 U.S.C. § 2255 on the basis that the claim was not explicitly pled violated Petitioner's right to due process under the Fifth Amendment to the United States Constitution and directly conflicted with this Court's decisions in *Hughes v. Rowe*, 449 U.S. 5 (1980), *Haines v. Kerner*, 404 U.S. 519 (1972) and *Sanders v. United States*, 373 U.S. 1 (1963)?

3. Whether sentence enhancements based upon facts found by a judge by a preponderance of the evidence were imposed upon Petitioner in violation of *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004)?

4. If the answer to question three is "yes," whether certiorari should be granted to answer the following question: whether this Court's decision in *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004), applies retroactively to cases on collateral review?

5. Whether certiorari should be granted to answer the question of whether the Eighth Circuit should have granted a Certificate of Appealability to review questions one to four?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were as in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to The Proceeding Below	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Petition	7
Conclusion	22

APPENDIX

Order of the Eighth Circuit denying Petitioner's application for a Certificate of Appealability and dismissing his appeal	App. 1
Order of the Eighth Circuit denying Petitioner's Motion for Reconsideration of his application for a Certificate of Appealability	App. 2
Order of the United States District Court for the Northern District of Iowa denying Petitioner's application for a Certificate of Appealability	App. 3
Order of the United States District Court for the Northern District of Iowa denying Petitioner's motion to vacate his sentence pursuant to 28 U.S.C. § 2255	App. 18

TABLE OF CONTENTS – Continued

Page

Opinion of the Eighth Circuit affirming the Judgment of Conviction and Sentence.....App. 42

Judgment of Conviction and Sentence filed in the United States District Court for the Northern District of Iowa.....App. 50

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 16, 17, 19

Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531 (2004) ..... *passim*

Chang v. United States, 250 F.3d 79 (2nd Cir. 2001) 9, 10

Florida v. Nixon, ___ U.S. ___, 125 S. Ct. 551 (2004) 8

Haines v. Kerner, 404 U.S. 519 (1972) 10, 14

Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991) 13

Hankerson v. North Carolina, 432 U.S. 233 (1977) 19

Hohn v. United States, 524 U.S. 236 (1998) 2

Hughes v. Rowe, 449 U.S. 5 (1980) 10, 14

In re: Winship, 397 U.S. 358 (1970) 19

Ivan V. v. City of New York, 407 U.S. 203 (1972) 19

Johnson v. Zerbst, 304 U.S. 458 (1938) 8

Jones v. Barnes, 463 U.S. 745 (1983) 8

Miller-El v. Cockrell, 537 U.S. 322 (2003) 20, 21

Mullaney v. Wilbur, 421 U.S. 684 (1975) 19

Ring v. Arizona, 536 U.S. 584 (2002) 19

Rock v. Arkansas, 483 U.S. 44 (1987) 8, 11, 12, 13

Saffle v. Parks, 494 U.S. 484 (1990) 19

Sanders v. United States, 373 U.S. 1 (1963) 10, 13, 14

Sawyer v. Smith, 497 U.S. 227 (1990) 19

Schriro v. Summerlin, ___ U.S. ___, 124 S. Ct. 2519 (2004) 19, 20

TABLE OF AUTHORITIES – Continued

Page

Slack v. McDaniel, 529 U.S. 473 (2000) 21

Strickland v. Washington, 466 U.S. 668 (1984) 12

Teague v. Lane, 489 U.S. 288 (1989) 18, 19

Underwood v. Clark, 939 F.2d 473 (7th Cir. 1991) 9

United States v. Ameline, 376 F.3d 967 (9th Cir. 2004) 18

United States v. Bernloehr, 833 F.2d 749 (8th Cir. 1987) 9

United States v. Booker, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, ___ U.S. ___ 125 S. Ct. 11 (2004) 18

United States v. Fanfan, ___ U.S. ___, 125 S. Ct. 12 (2004) 18

United States v. McMeans, 927 F.2d 162 (4th Cir. 1991) 9

United States v. Mullins, 315 F.3d 449 (5th Cir. 2002) 9

United States v. Ortiz, 82 F.3d 1066 (D.C. Cir. 1996) 9

United States v. Penaranda, 375 F.3d 238 (2d Cir. 2004) (*en banc*) 18

United States v. Pino-Noriega, 189 F.3d 1089 (9th Cir. 1999) 9

United States v. Sturdy, 207 F.3d 448 (8th Cir. 2000) 1, 4

United States v. Teague, 908 F.2d 752 (11th Cir. 1990), *rev'd on other grounds*, 953 F.2d 1525 (11th Cir. 1992) (*en banc*) 9

White v. Wyrick, 530 F.2d 818 (8th Cir. 1976) 13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V 2, 8, 14

U.S. Const. Amend VI 2, 8, 18

STATUTES AND RULES

28 U.S.C. § 1254 2

28 U.S.C. § 2253(c) 4, 5

28 U.S.C. § 2255 4

Fed.R.App. 22(b) 5

PETITION FOR WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The unpublished Order of the Eighth Circuit Court of Appeals (hereinafter "Eighth Circuit") denying Petitioner's application for a Certificate of Appealability and dismissing his appeal is reprinted in the appendix at App. 1. The unpublished Order of the Eighth Circuit denying Petitioner's motion for reconsideration of his application for a Certificate of Appealability is reprinted in the appendix at App. 2. The unpublished Order of the United States District Court for the Northern District of Iowa (hereinafter "District Court") denying Petitioner's application for a Certificate of Appealability is reprinted in the appendix at App. 3-17. The unpublished Order of the District Court denying Petitioner's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 is reprinted in the appendix at App. 18-41. The Opinion of the Eighth Circuit affirming the judgment of conviction and sentence of the District Court is reported at *United States v. Sturdy*, 207 F.3d 448 (8th Cir. 2000) and reprinted in the appendix at App. 42-49. The unpublished Judgment of Conviction and Sentence of the District Court is reprinted in the appendix at App. 50-61.

JURISDICTION

The Judgment of the Eighth Circuit denying Petitioner's application for a Certificate of Appealability and dismissing his appeal was entered on October 7, 2004. (App. 1). This petition for a writ of certiorari is filed within ninety days of that date as required by Supreme Court Rule 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This Court has jurisdiction to review a final order of a United States Court of Appeals denying a certificate of appealability. *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

In April, 1998, Petitioner Robert Kye Sturdy proceeded to a jury trial pursuant to an indictment charging him with possessing with intent to distribute 10 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(viii) (Count One), possessing with intent to distribute an unspecified quantity of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D) (Count Two), carrying a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c) (Count Three) and possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e) (Count Four). The jury convicted Petitioner on all counts.

Subsequently, Petitioner was sentenced to a term of imprisonment of 600 months. The District Court reached such sentence by adding a 360 month sentence imposed for Counts One and Four to a 240 month sentence imposed for Count Three. The trial court ordered a 120 month sentence imposed for Count Two to run concurrently to the sentence imposed for Counts One and Four. (App. 50).

Sturdy's conviction and sentence were affirmed on direct appeal on March 16, 2000. *See United States v. Sturdy*, 207 F.3d 448 (8th Cir. 2000). (App. 42).

On March 6, 2001, Sturdy timely filed a *pro se* motion to vacate pursuant to 28 U.S.C. § 2255. In that *pro se* Section 2255 motion and in a timely motion to supplement that Section 2255 motion filed on April 2, 2001, Sturdy raised multiple claims. These claims included that his Fifth and Sixth Amendment right to testify in his own defense was violated, that sentence enhancements based upon facts found by a judge by a preponderance of the evidence were imposed upon him in violation of the Fifth Amendment right to due process and Sixth Amendment right to proper notice and to a jury trial and that he was denied his Sixth Amendment right to effective assistance of counsel. On August 27, 2001, the government filed a resistance to Sturdy's Section 2255 motion and supplement. On October 5, 2001, Sturdy filed a *pro se* reply. On January 23, 2004, the District Court denied Sturdy's Section 2255 motion. (App. 18-41).[1]

Subsequently, in the District Court, Petitioner timely filed a notice of appeal and a motion under 28 U.S.C. § 2253(c) for a Certificate of Appealability seeking to appeal the District Court's Order denying his Section 2255 motion. However, the District Court denied Petitioner's motion for a Certificate of Appealability. (App. 3-17). Petitioner then filed a request for a Certificate of Appealability

[1] Petitioner's Section 2255 motion incorporated and referred to his memorandum in support thereof which was stapled to the motion when filed. These documents are referred to herein as "Motion to Vacate" or "Section 2255 motion" or "Section 2255 petition."

in the Eighth Circuit pursuant to 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b). However, the Eighth Circuit denied that request. (App. 1).

(ii) Statement of Facts

On May 17, 1995, Bill Price, a convicted felon and a resident of Waterloo, Iowa, telephoned an FBI agent and stated that Petitioner had offered to sell him methamphetamine and marijuana that day. Price also stated that Petitioner was driving a white van with Texas license plates and was staying at a motel in the area. Subsequently, the FBI agent observed a white van with Texas license plates at a Waterloo motel.

When that van left the parking lot, law enforcement officers followed it. No police officers could identify Petitioner as the "white male" who left that parking lot in the van. Police officers attempted to make a traffic stop of the van. However, the driver sped away from the scene resulting in a high speed chase.

As some point during the chase, officers saw the driver throw a duffle bag out of the van. An inventory of the bag revealed that it contained, among other items, approximately $20,000 in cash, a loaded handgun, a digital scale, methamphetamine and marijuana in cloth bags, and a prescription pill bottle bearing the name Robert Sturdy.

The chase ended after the van crashed into a house. The pursuing officers who had briefly lost sight of the van, found the van unoccupied when they arrived at the crash scene. About a block and a half away from the crash scene, a police officer observed Petitioner running near a house

and arrested him. Only one officer claimed to have identified Petitioner as the driver during the chase. However, this claim was seriously inconsistent with other evidence presented at the trial.

The police continued their investigation at the motel where they first observed the white van. Investigators discovered that someone in one of the rooms had made a phone call to Texas. The registration card for that room had been signed by a Bryan Russell and listed the license plate number of the white van involved in the chase.

Petitioner's defense at trial was that Bryan Russell – not Petitioner – was the operator of the white van involved in the high speed chase. It was undisputed that Russell was the owner of the van. Russell denied driving the van during the high speed chase and claimed that the van and his wallet had been stolen before that chase.

The defense called Bret Brown and Jaime Maggard, acquaintances of Petitioner, as witnesses. Both witnesses testified that Petitioner and Maggard had traveled to Waterloo with Bryan Russell to purchase a van for Brown, and that Bryan Russell, not Petitioner, was driving the van during the police surveillance and chase of the vehicle. Maggard testified that Petitioner was with her and another friend when they happened to pass the white van as it was being chased by police. Maggard further testified that Petitioner was at the crash site because she and Petitioner followed the van in their vehicle and Petitioner ran to the van when he realized that it had crashed into a house.

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted to answer the question of whether a defendant in a criminal case who does not object at trial to his counsel preventing him from testifying waives his Fifth and Sixth Amendment right to testify in his own defense, as has been held by the Fourth, Eighth and Ninth Circuits; or instead cannot be deemed to have waived his right to testify by merely being silent as has been held by the Second, Fifth, Seventh, Eleventh and D.C. Circuits.

In his Section 2255 motion, Petitioner alleged that "initially" he did not "believe it would be a good idea to testify" but that he "changed his mind and decided to testify ... after hearing the government's evidence." Indeed, Petitioner asserted that, after hearing the government's evidence, he believed it was "necessary" and "crucial" for him to testify in order to have a chance at an acquittal. Petitioner also summarized what his testimony would have been had he been allowed to testify, including that Russell – not Petitioner – was the driver of the van and that the drugs and firearm thrown from the van did not belong to Petitioner. Nonetheless, according to Petitioner's uncontradicted assertions, "[defense] counsel refused to allow him to testify in his own defense" thereby violating his right to testify. Notably, at the close of the defense case at trial, the District Court made no inquiry about whether Petitioner was waiving his right to testify, and Petitioner's counsel volunteered nothing about how the decision was made or who made it.

In its Order denying Petitioner's Section 2255 motion, the District Court ignored Petitioner's claim that his

constitutional right to testify was violated and mischaracterized it as just another component of his ineffective assistance of counsel claim. Subsequently, in denying Petitioner's request for a Certificate of Appealability, the District Court addressed the constitutional right to testify claim and expressly found that Petitioner initially was not going to testify but "changed his mind, decided to testify and made his desire to testify known to trial counsel." (App. 14). The District Court further ruled that, since Petitioner remained silent when his trial counsel rested the defense case without calling him to testify, he waived his constitutional right to testify. (App. 15).

In his requests to the District Court and the Eighth Circuit for a Certificate of Appealability, the Petitioner asserted that such a certificate should issue to answer the question of whether it was error to treat his silence at trial as a waiver of his constitutional right to testify. A defendant in a criminal case has a constitutional right, grounded in the Due Process Clause of the Fifth Amendment of the United States Constitution, the Sixth Amendment Compulsory Process Clause of the United States Constitution and the Fifth Amendment's guarantee against compelled testimony. *See Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). Because the right to testify is a fundamental constitutional guarantee, only the defendant is empowered to waive that right. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (stating "ultimate authority" to decide whether to testify rests with the defendant); *Florida v. Nixon*, ___ U.S. ___, 125 S. Ct. 551, 560 (2004) (same). Moreover, for such a waiver to be effective, it must be made intelligently, voluntarily and knowingly. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

There is a conflict among the Circuits as to the issue of whether a defendant who does not personally object at trial to being prevented from taking the stand thereby waives or forfeits his right to testify. The Fourth, Eighth and Ninth Circuits have held that a defendant waives his right to testify when he remains silent in the face of his attorney's decision not to call him as a witness. *See United States v. Pino-Noriega*, 189 F.3d 1089, 1095 (9th Cir. 1999) ("When a defendant remains silent in the face of his attorney's decision not to call him as a witness, he waives the right to testify.") (citations omitted); *United States v. Bernloehr*, 833 F.2d 749, 751-52 (8th Cir. 1987) (holding that the right to testify is waived where a defendant does not object at trial); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991) (holding that a defendant's testimony at an earlier trial evinced knowledge of the right to testify and, therefore, the right was waived when he did not assert it a later trial). The Second, Fifth, Seventh, Eleventh and District of Columbia Circuits, however, have held that a defendant need not object at trial to preserve a claim that his counsel prevented him from testifying. *See Chang v. United States*, 250 F.3d 79, 82-84 (2nd Cir. 2001) (holding that it is improper to treat a defendant's silence at trial as a waiver or forfeiture of his right to testify); *United States v. Mullins*, 315 F.3d 449, 454-56 (5th Cir. 2002) (same); *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) (same); *United States v. Teague*, 908 F.2d 752, 759-60 (11th Cir. 1990) (same), *rev'd on other grounds*, 953 F.2d 1525 (11th Cir. 1992) (*en banc*); *United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996) (same).

Petitioner contends that the Second, Fifth, Seventh, Eleventh and District of Columbia Circuit Courts of Appeal have adopted the better reasoned view because

"[a]t trial, defendants generally must speak only through counsel, and, absent something in the record suggesting a knowing waiver, silence alone cannot support an inference of such a waiver." *Chang*, 250 F.3d at 84.

In *Chang*, *supra*, the Second Circuit expressly acknowledged that there is a split among the Circuits on this issue. Since there is a conflict among the Circuits as to whether or not a defendant's silence at his criminal trial can be treated as a waiver of his constitutional right to testify, this issue is ripe for review by this Court.

In the event that this Court grants this petition and holds that it is improper to treat the silence of a defendant in a criminal case as a waiver of his right to testify, the Petitioner contends that the District Court erred in ruling to the contrary and that both the District Court and the Eighth Circuit erred in denying his Certificate of Appealability on this issue.

II. Certiorari should be granted to determine whether the rejection of a valid legal claim asserted in the Petitioner's *pro se* motion under 28 U.S.C. § 2255 on the basis that the claim was not explicitly pled violated Petitioner's right to due process under the Fifth Amendment to the United States Constitution and directly conflicted with this Court's decisions in *Hughes v. Rowe*, 449 U.S. 5 (1980), *Haines v. Kerner*, 404 U.S. 519 (1972) and *Sanders v. United States*, 373 U.S. 1 (1963).

As previously explained, Petitioner claimed in his Section 2255 motion that he did not knowingly and intelligently waive his constitutional right to testify in his own

defense. More specifically, in a heading under roman numeral two of that motion, he directly and separately asserted that he was "denied his fundamental constitutional right to testify in his own defense at trial when trial counsel refused to allow [him] the right to testify in violation of his Fifth and Sixth Amendment's [sic]" rights. (App. 6, n. 1). Furthermore, in that motion, Petitioner expressly discussed the legal principle that a criminal defendant has a fundamental constitutional right to testify that is granted to the defendant personally and not to his counsel. Petitioner additionally cited relevant case law in support of that principle including *Rock v. Arkansas*, 483 U.S. 44 (1987). Although later, in the course of making his argument, Petitioner ***also*** alleged that the order he received from trial counsel not to testify constituted ineffective assistance of counsel, Petitioner brought that ineffective assistance of counsel claim in an entirely separate section of his memorandum in support of his Section 2255 motion.

However, the government sought to lump Petitioner's analytically distinct *Rock* claim as ***only*** a component of his other ineffectiveness claims when it filed its Resistance To Petitioner's Section 2255 motion. In his Reply to the government's Resistance, Petitioner sought to correct the government's mischaracterization of his claim beginning with the heading, "*Contrary to the Government's Position*, Movant Was Denied His Fundamental Constitutional Right To Testify." In that Reply, Petitioner again discussed the principle that a criminal defendant has a constitutional right to testify and cited relevant case law.

In its Order denying Petitioner's Section 2255 motion, the District Court made the same mistake as the government and erroneously characterized Petitioner's *Rock*

claim as just another component of his "ineffective assistance" claim. (App. 33). Instead of analyzing Petitioner's claim under *Rock* and its progeny, the District Court analyzed the claim only under the ineffective assistance of counsel standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), finding that Petitioner's ***trial counsel*** had made the "decision" not to call Petitioner as a witness and that this "decision" did not constitute ineffective assistance of counsel. (App. 33-35).

Subsequently, in Petitioner's application with the District Court for a Certificate of Appealability, he pointed out that the District Court improperly ignored his *Rock* claims. Thereafter, in the District Court's order denying Petitioner's motion for a Certificate of Appealability, the District Court ignored the fact that Petitioner directly and separately asserted in his *pro se* Section 2255 motion that he was "denied his fundamental constitutional right to testify in his own defense at trial when trial counsel refused to allow [him] the right to testify in violation of his Fifth and Sixth Amendments [sic]" rights and that Petitioner expressly discussed the legal principle that a criminal defendant has a fundamental constitutional right to testify that is granted to him personally and not to his counsel and cited relevant supporting case law. Instead, the District Court ruled that Petitioner "did not explicitly plead, as a separate ground for relief in his 28 U.S.C. § 2255 motion, that he did not knowingly and voluntarily waive his right to testify" and, therefore, was procedurally barred from asserting his constitutional right to testify

claim. (App. 12).[2] Thereafter, in the Petitioner's requests for a Certificate of Appealability filed in the District Court and the Eighth Circuit, the Petitioner specifically asserted that, in so ruling, the District Court erroneously failed to interpret this claim liberally since Petitioner had no legal expertise and asserted this claim *pro se*.

In finding that Petitioner's *Rock* claim was outside the scope of his Section 2255 motion, the District Court ignored the standard that must govern such *pro se* claims. Where a habeas petitioner without legal expertise prepares his own pleading, courts must interpret it liberally and construe it to encompass any allegation stating federal relief. *E.g., White v. Wyrick*, 530 F.2d 818, 819 (8th Cir. 1976). As the Tenth Circuit has said:

> [I]f the court can reasonably read the pleadings to state a valid claim on which the plaintiff would prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.

Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). Indeed, in *Sanders v. United States*, 373 U.S. 1, 22-23 (1963) (Brennan, J.) this Court noted that, "[t]he judge is not required to limit his decision on the . . . [*pro se* habeas] motion to the grounds narrowly alleged, or to deny the motion out of hand because the allegations are vague, conclusional, or inartistically expressed. He is free to adopt any appropriate means for inquiry into the legality

---

[2] As previously explained in Argument I, however, the District Court elected to discuss the merits of this right to testify claim for the record. (App. 12).

of the prisoner's detention in order to ascertain all possible grounds upon which the prisoner might claim to be entitled to relief."

Subsequently, this Court held that allegations of a prisoner's *pro se* complaint "however inartfully drafted" are held "to less stringent standards than formal pleadings drafted by lawyers. . . ." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Although in *Haines*, it was the petitioner's factual allegations that fell short of the normal standards of pleading, the interpretive principle invoked there applies as well to cases in which a *pro se* litigant fails to explicitly make clear the legal theory under which relief is sought. For example, in *Hughes v. Rowe*, 449 U.S. 5 (1980), the petitioner did not make explicit whether he sought relief under the Eighth Amendment or under the Due Process Clause, but he did allege, *inter alia*, that he had been placed in solitary confinement and that he had been given no hearing on disciplinary charges for which he received that punishment. This Court, relying upon *Haines, supra*, construed the petition as a claim of a due process violation and reversed the dismissal of the petition for failure to state a claim.

Accordingly, in this case where Petitioner alleged in his *pro se* Section 2255 motion that he was denied his constitutional right to testify in his own defense and cited relevant case law in support of this claim, the District Court's rejection of this claim on the basis that it was not explicitly pled violated Petitioner's Fifth Amendment right to due process and directly conflicted with this Court's decisions in *Hughes v. Rowe*, 449 U.S. 5 (1980), *Haines v. Kerner*, 404 U.S. 519 (1972) and *Sanders v. United States*, 373 U.S. 1 (1963). The Eighth Circuit plainly erred in denying a Certificate of Appealability on this issue.

III. Certiorari should be granted to answer the question of whether sentence enhancements based upon facts found by a judge by a preponderance of the evidence were imposed upon Petitioner in violation of *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004).

In Petitioner's Section 2255 motion, he contended that his conviction and sentence were rendered in violation of his Fifth Amendment right to due process and his Sixth Amendment right to proper notice and to a jury trial. In support of this contention, Petitioner asserted: (1) Count One of the final superseding indictment charged Petitioner with possessing with intent to distribute a minimum of ten grams of methamphetamine, and the District Court – not the jury – attributed 63.54 grams of actual methamphetamine to Petitioner at sentencing using the preponderance of the evidence standard; and (2) Count Two of the final superseding indictment did not charge a specific quantity of marijuana, but the District Court – not the jury – attributed 3.2 kilograms of marijuana to Petitioner at sentencing using the preponderance of the evidence standard.

In addition, Petitioner contended in that motion that the District Court violated his Fifth Amendment right to due process and his Sixth Amendment right to proper notice and to a jury trial when the District Court – not the jury – applied the preponderance of the evidence standard and imposed a two-level upward adjustment in his base offense level pursuant to U.S.S.G. § 3C1.2 for reckless endangerment during flight and applied U.S.S.G. § 4B1.1(A)

because it found that Petitioner qualified as a career offender.

The District Court denied all of these claims on the basis that they could not be raised on collateral review. (App. 27-29).

In *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004), this Court held that every defendant has the right to insist that the prosecutor prove to the jury beyond a reasonable doubt all facts legally essential to the punishment. The specific issue in *Blakely* was whether the sentencing court could impose a sentence which was three years beyond what the guidelines law allowed for kidnaping (the crime to which the defendant pled), based upon a disputed finding that the defendant acted with deliberate cruelty – a statutorily enumerated ground for departure. Reversing the lower court, this Court held that imposition of the additional three-year sentence violated the defendant's Sixth Amendment jury trial guarantee. As explained by this Court, this holding was merely a logical application of the fundamental rule in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Blakely*, 124 S. Ct. at 2543 ("As *Apprendi* held, every defendant has the **right** to insist that the prosecutor prove to a jury all facts legally essential to the punishment. . . . That should be the end of the matter.") (emphasis added); *see also id.*, 124 S. Ct. at 2537 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to punishment, and the judge exceeds his proper authority.").

While the Federal Sentencing Guidelines were not before this Court in *Blakely*, and accordingly, this Court claimed to have "expressed no opinion" as to the import of its opinion for Federal Guidelines sentencing, *id.*, 124 S. Ct. at 2538 n. 9, the import is clear. Indeed, in rejecting the idea that "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it," and in questioning "[w]hy perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt," *id.*, 124 S. Ct. at 2539, *and* in comparing *Apprendi*'s fairness to a regime where "the defendant with no warning in indictment or plea would see his maximum sentence balloon . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts . . . compiled by a probation officer who the judge thinks more likely got it right than got it wrong," *id.*, 124 S. Ct. at 2542, the majority of this Court implicitly – if not explicitly – acknowledged that its holding would preclude **federal district courts** from sentencing defendants based upon uncharged relevant conduct, and from applying many if not most of the adjustments under Chapters 2 and 3 of the Federal Sentencing Guidelines. Indeed, Justice O'Connor, writing in dissent and joined by Justice Breyer, candidly acknowledged that "[t]he structure of the Federal Sentencing Guidelines [] does not . . . provide any grounds for distinction. . . . **If anything, the structural differences that do exist make the Federal Sentencing Guidelines more vulnerable to attack.**" *Id.*, 124 S. Ct. at 2549. (O'Connor, J., dissenting) (emphasis added).

At present, several Circuit Courts of Appeals have held that *Blakely* applies to the Federal Sentencing

Guidelines. *See United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, ___ U.S. ___ 125 S. Ct. 11 (2004); *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). Furthermore, the Second Circuit has sought certification on this issue from this Court as it was unable to reach it own decision. *See United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004) (*en banc*). Moreover, this Court has recently granted certiorari to consider the question of whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the Federal Sentencing Guidelines based upon a sentencing judge's determination of a fact other than a prior conviction that was not found by the jury or admitted by the defendant. *See Booker, supra*, *United States v. Fanfan*, ___ U.S. ___, 125 S. Ct. 12 (2004). Accordingly, certiorari should be granted to answer the question of whether the sentence enhancements imposed upon Petitioner based upon facts found by a judge by a preponderance of the evidence were imposed in violation of *Blakely, supra*.

IV. If the answer to the question posed in Argument III is "yes," certiorari should be granted to answer the following question: Whether this Court's decision in *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004), applies retroactively to cases on collateral review.

The issue of whether *Blakely* applies to cases on initial collateral review is governed by *Teague v. Lane*, 489 U.S. 288 (1989). This Court in *Teague* held that a right that has been newly recognized by this Court is not to be applied retroactively on collateral review ***unless*** it falls

within one of two exceptions: (1) the new rule places certain kinds of primary conduct beyond the power of the criminal law making authority to proscribe, or (2) the rule requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 305-310 (citations omitted). A rule falls within the second *Teague* exception if it is a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (citation omitted).

To qualify under the second *Teague* exception, the new rule must satisfy a two-pronged test: (1) it must relate to the accuracy of the proceeding; and (2) it must "alter our understanding of the 'bedrock procedural elements' essential to the [fundamental] fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). Notably, the dissent in *Apprendi, supra*, pointed out that *Apprendi*, the predecessor to *Blakely*, "will surely be remembered as a watershed change in constitutional law." *See id.* at 2380 (O'Connor, J., dissenting).

This Court has not yet decided the issue of whether *Blakely* applies to cases on initial collateral review. However, other cases where the "beyond a reasonable doubt standard" was at issue, such as *In re: Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), were held retroactive because they were essential to accurate fact-finding. *See Ivan V. v. City of New York*, 407 U.S. 203 (1972) (*Winship* retroactive); *Hankerson v. North Carolina*, 432 U.S. 233 (1977) (*Mullaney* retroactive).

It is noteworthy that, in *Schriro v. Summerlin*, ___ U.S. ___, 124 S. Ct. 2519 (2004), this Court held that *Ring v. Arizona*, 536 U.S. 584 (2002), which extended application of

Apprendi to facts increasing a defendant's sentence from life imprisonment to death, is not retroactive to cases on collateral review. However, in *Summerlin*, Justice O'Connor wrote that, despite the holding of *Summerlin*, final guideline judgments "arguably remain open to collateral attack." 124 S. Ct. at 2549. Furthermore, *Summerlin* is distinguishable from the instant case because, under the death-penalty scheme at issue in *Summerlin*, the aggravating factors which increased the defendant's sentence from life imprisonment to death had been found by the judge using the beyond a reasonable doubt standard. Therefore, in *Summerlin* this Court only focused on whether the judge was somehow less accurate or fair than a jury, concluding that a judge was not less fair or accurate. In federal cases such as the instant case, however, the judge, when applying the Federal Sentencing Guidelines, does not make findings regarding sentencing factors by the higher standard of proof beyond a reasonable doubt. Therefore, if this Court holds that *Blakely* applies to such cases, that holding would plainly be a watershed change in constitutional law that would improve the accuracy of sentencing. Accordingly, such a holding must be applied retroactively to cases on collateral review.

V. Certiorari should be granted to answer the question of whether the Eighth Circuit should have granted a Certificate of Appealability to review the issues presented in Arguments I to IV herein.

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court discussed the standards governing the issuance of

Certificates of Appealability.[3] This Court began by re-affirming the basic criteria set forth in *Slack v. McDaniel*, 529 U.S. 473 (2000), *i.e.*, that a petitioner "need only demonstrate 'a substantial showing of the denial of a constitutional right'" – a showing that is satisfied "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Cockrell*, 123 S. Ct. at 1034, quoting *Slack*, 529 U.S. at 484. The Supreme Court, however, disagreed with the Fifth Circuit's application of this standard.

In reversing the Fifth Circuit's denial of a Certificate of Appealability, this Court emphasized that the *Slack* standard "does not require a showing that the appeal will succeed" and that an application should not be denied simply because the court "believes the applicant will not demonstrate an entitlement to relief." *Id.* at 1039. The certificate requirement is merely a "threshold, or gateway, test" and does not even require that a petitioner show "that some jurists would grant the petition for habeas corpus." *Id.* at 1040. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

The four issues raised in Arguments I to IV herein were, at the very least, "debatable" and thus deserving of appellate review. Furthermore, with respect to the issue of

---

[3] Although this Court in *Cockrell* was considering the standards in the context of a habeas petition filed by a State prisoner under 28 U.S.C. § 2254, the same standards apply to Petitioner's motion to vacate filed under 28 U.S.C. § 2255.

whether Petitioner's constitutional right to testify was violated, the Eighth Circuit should have issued a Certificate of Appealability so that Petitioner could exhaust this claim and present the previously discussed split in the Circuits to this Court. Accordingly, Petitioner respectfully requests that this Court grant his Petition for Certiorari in order to answer the question of whether or not the Eighth Circuit erred in denying a Certificate of Appealability as to these issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Miami, Florida
January 5, 2005

Respectfully submitted,

MARCIA J. SILVERS
Counsel of Record for Petitioner
DUNLAP & SILVERS, P.A.
Suite 601
2601 South Bayshore Drive
Miami, Florida 33133
305/854-9666

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1767

Robert Kye Sturdy, Appellant,	*	Appeal from the United States District Court for the Northern District of Iowa
vs.	*	
United States of America, Appellee.	*	

Before WOLLMAN, FAGG, and BYE, Circuit Judges

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.
(5361-010199)

October 7, 2004

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1767

Robert Kye Sturdy, Appellant,	*	Appeal from the United States District Court for the Northern District of Iowa
vs.	*	
United States of America, Appellee.	*	

Appellant's motion for reconsideration of this Court's judgment of October 7, 2004, has been considered by the Court and is denied.

December 1, 2004

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA EASTERN-WATERLOO DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. ROBERT KYE STURDY, Defendant.	No. CR97-2002-LRR No. C01-2016-LRR **ORDER**

This matter is before the court pursuant to a notice of appeal and motion for a certificate of appealability (docket no. 282). Counsel, on behalf of the defendant ("Sturdy"), filed the notice of appeal on February 19, 2004 and the motion for a certificate of appealability on February 24, 2004. Sturdy seeks to appeal the court's January 23, 2004 order denying his 28 U.S.C. § 2255 motion.

I. DISCUSSION

A. The Local Rules

On February 19, 2004, counsel filed a motion to appear pro hac vice. On February 20, 2004, the court granted such motion. The granting of pro hac vice status does not exempt counsel from following the Local Rules. Local Rule 7.1(h) provides:

> Except for trial briefs, preliminary injunction briefs, and briefs supporting or resisting habeas corpus applications, a brief may not exceed 20 pages. . . . A party may request leave to file a brief longer than the length prescribed in the

> Local Rules by filing a motion containing a statement of the proposed length of the brief and demonstrating good cause for the proposed length. . . .

On February 24, 2004, counsel filed a 30 page brief in support of the motion for a certificate of appealability. Counsel, however, did not request leave to file a brief longer than the prescribed 20 pages. Although under Local Rule 1.1(f) it is appropriate to strike from the record the brief supporting the motion for a certificate of appealability because counsel failed to comply with the Local Rules, the court elects to review the merits of the motion for a certificate of appealability.

B. The Standard for a Certificate of Appealability

A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). *See Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may only issue if a defendant has made a substantial showing of the denial of a constitutional right. *See See* [sic] *Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedeman*, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994)). *See also See also* [sic] *Miller-El*, 537 U.S. at 335-36, 123

S. Ct. at 1039 (reiterating standard). Moreover, "'where a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: the [defendant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 123 S. Ct. at 1040 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)).

C. The Issues Sturdy Believes Warrant a Certificate of Appealability

Sturdy seeks a certificate of appealability as to the resolution of four issues, including:

> 1. The court's denial, without an evidentiary hearing, of Sturdy's claim that he did not knowingly and intelligently waive his Fifth and Sixth Amendment right to testify in his own defense and the court's mis-characterization of that claim as an attack on the effectiveness of trial counsel;
>
> 2. The court's denial, without an evidentiary hearing, of Sturdy's claim that he was denied his Sixth Amendment right to effective assistance of counsel at trial when trial counsel failed to allow him to testify in his own defense at trial and failed to investigate and call as trial witnesses Jane Lynch, Dennis O'Brien and Thomas Settles;
>
> 3. The court's denial, without an evidentiary hearing, of Sturdy's claim that he was denied his Sixth Amendment right to effective assistance of counsel when he was forced to stand trial with the assistance of appointed counsel with whom

he had become embroiled in an irreconcilable conflict during the second day of trial; and

4. The court's denial, without an evidentiary hearing, of Sturdy's claim that he was denied his Sixth Amendment right to effective assistance of counsel when appellate counsel failed to raise issue 1 and issue 2 on direct appeal.

The court now turns to address the four issues Sturdy seeks to appeal.

1. Sturdy Did Not Knowingly and Intelligently Waive His Fifth Amendment and Sixth Amendment Right to Testify in His Own Defense

Sturdy maintains he is entitled to a certificate of appealability because the court mis-characterized one of his claims. Specifically, Sturdy contends that the court erred when it characterized Ground II as an ineffective assistance of counsel claim.[1] Although he acknowledges there is language pertaining to an ineffective assistance of counsel claim in Ground II, Sturdy argues the court should have treated Ground II as a claim that he did not knowingly and intelligently waive his constitutional right to testify.

In his 28 U.S.C. § 2255 motion, Sturdy asserted two issues:

---

[1] Ground II reads:

Sturdy Was Denied His Fundamental Constitutional Right to Testify in His Own Defense at Trial When Trial Counsel Refused to Allow Sturdy the Right to Testify in Violation of His Fifth and Sixth Amendment's [sic].

> 1) Sturdy's Conviction/Sentence Rendered in Violation of Fifth/Sixth Amendment's [sic] under *Apprendi* . . . ; and
>
> 2) Sturdy Was Denied Fundamental Constitutional Rights Under Fifth/Sixth Amendment's [sic] Due to Ineffective Assistance of Trial/ Appellate Counsel.

To support the latter issue, Sturdy stated six grounds:

> 1) Irreconcilable conflcit [sic] of interest between trial counsel and Sturdy. Court erred in failing to sufficiently inquire;
>
> 2) Trial counsel denied Sturdy's constitutional right to testify at trial;
>
> 3) Trial counsel failed to object to erroneous jury charge regarding element of intent;
>
> 4) Trial counsel failed to investigate and subpoena witnesses and prepare for trial;
>
> 5) Trial counsel failed to investigate/Sturdy presents evidence that establishes his actual innocence of the offense charged and convicted under; and
>
> 6) Appellate counsel failed to raise the above claims on direct appeal.

Along with his 28 U.S.C. § 2255 motion, Sturdy submitted a memorandum of law. Such memorandum included three sections: I-Statement of Jurisdiction; II-Statement of Case; and III-Statement of Arguments. Sturdy divided section III into two subsections: A and B. The former subsection elaborated on the *Apprendi* issue and the latter subsection

addressed the ineffective assistance of counsel issue.[2] In Issue B, Sturdy laid out the standard to be applied when addressing ineffective assistance of counsel claims and utilized such standard when discussing the six grounds previously laid out in his 28 U.S.C. § 2255 motion.

In its resistance, the government treated Ground II as an ineffective assistance of counsel claim. The government used "Defendant Was Not Denied Effective Assistance of Counsel by Not Testifying on His Own Behalf" as its heading for subsection C of section V and suggested in such subsection that Sturdy was alleging he received ineffective assistance because counsel prevented him from testifying in his own behalf. When addressing the merits of Sturdy's claim, the government, in part, stated:

> [W]hile a defendant has a right to testify in his own behalf, the record is silent as to [Sturdy's] desire to testify. . . . [Sturdy] knows how to bring matters to the court's attention and if [he] felt he was being deprived of his right to testify, he certainly could have brought this to the court's attention. . . .

In his reply, Sturdy addressed the government's arguments under six headings, lettered A through F. In section C, Sturdy discussed Ground II. The heading of section C stated:

---

[2] Issue B reads:

> Sturdy Was Denied His Fundamental Constitutional Rights Under the Fifth and Sixth Amendment's [sic] when Sturdy Was Denied Effective Assistance of Trial and Appellate Counsel in This Case.

> Contrary to the Government's Position, Movant Was Denied His Fundamental Constitutional Right to Testify, In Violation of the Sixth Amendment . . .

To support his position, Sturdy stated:

> The government contends that defense counsel asserts that Sturdy never changed his mind about not wanting to testify. . . . Sturdy refutes the government's claim and again reasserts that he specifically informed his attorney that he wanted to testify in his own defense. . . .

After making such statement, Sturdy discussed the principle that a criminal defendant has a fundamental constitutional right to testify and cited relevant case law, including case law that he had relied on in his memorandum of law. Although he did not include language pertaining to an ineffective assistance of counsel claim in his reply, Sturdy did not explicitly state that the government mis-characterized his claim when it failed to construe it as a claim that he did not knowingly and intelligently waive his constitutional right to testify.

In its January 23, 2004 order, the court described the arguments Sturdy raised in his 28 U.S.C. § 2255 motion. Specifically, the court stated:

> Sturdy raises several arguments challenging his conviction and resulting sentence based on *Apprendi*[3] and ineffective assistance of counsel.

---

[3] *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (holding that, with the exception of prior convictions, any fact that increases the penalty for a crime beyond the maximum statutory penalty must be submitted to a jury and proven beyond a reasonable doubt).

> With regard to the latter, Sturdy contends he was denied effective assistance because counsel: 1) created an irreconcilable conflict of interest; 2) denied him his right to testify; 3) failed to object to a jury instruction regarding intent; 4) failed to investigate, subpoena witnesses and prepare for trial; 5) failed to present evidence of actual innocense; and 6) failed to raise claims one through five on direct appeal.

When addressing the merits of Sturdy's 28 U.S.C. § 2255 motion, the court separately addressed Sturdy's claims based on *Apprendi* and the claims based on *Strickland.*[4] In subsection 2 of section D, the court addressed Ground II and concluded trial counsel acted within the wide range of reasonable competence demanded by the Sixth Amendment when he advised Sturdy not to testify. *Cf. El-Tabech v. Hopkins*, 997 F.2d 386, 389-90 (8th Cir. 1993) (concluding no ineffective assistance of counsel where evidence of waiver is in the record and the defendant was silent through jury instruction conference discussing him not testifying); *United States v. Bernloehr*, 833 F.2d 749, 752 (8th Cir. 1987) (addressing waiver of right to testify argument and assuming no ineffective assistance of counsel because the defendant made no objection when his counsel rested without calling him to the stand),

Based on the record, the court fairly characterized Sturdy's claims. Despite his assertion to the contrary, Sturdy did not explicitly plead, as a separate ground for relief in his 28 U.S.C. § 2255 motion, that he did not

---

[4] *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (establishing standard to be applied when addressing ineffective assistance of counsel claims).

knowingly and involuntarily waive his right to testify. *Cf. Frey v. Schuetzle*, 78 F.3d 359, 361 (8th Cir. 1996) ("[when a defendant is] seeking habeas relief on the basis that he did not knowingly and voluntarily waive his right to testify, he should . . . explicitly [plead] that as a separate ground for relief in his federal habeas petition."); *El-Tabech* 997 F.2d at 389-90 (distinguishing waiver of right to testify claim from ineffective assistance of counsel claim). In fact, Sturdy never stated in either his memorandum of law or his reply that he was solely claiming he did not knowingly, intelligently and voluntarily waive his right to testify in his own behalf. The earliest it possibly can be said that Sturdy sought to raise the fundamental constitutional right to testify issue as a separate issue was in his reply brief, and, even in that pleading, it appears Sturdy only asserted such theory to bolster his ineffective assistance of counsel claim. Sturdy's assertion that he raised a separate claim, rather than an ineffective assistance of counsel claim, belies the record; Sturdy's only claim concerning his right to testify was couched in terms of ineffective assistance of counsel. *Cf. Frey*, 78 F.3d at 361 (concluding district court erred when it granted relief on a basis that was not alleged) (citing *El-Tabech*, 997 F.2d at 389).

Assuming he first raised the fundamental constitutional right to testify issue as a separate issue in his reply brief, the Antiterrorism and Effective Death Penalty Act bars Sturdy from asserting it. Under the Antiterrorism and Effective Death Penalty Act, a 28 U.S.C. § 2255 motion must be filed within one year of the date the conviction becomes final, except in circumstances not present here. *See* 28 U.S.C. § 2255. Although Sturdy timely filed his 28 U.S.C. § 2255 motion on March 16,

2000, he did not file his reply until October 5, 2001, which is well past the last date he could have timely filed an amendment to his 28 U.S.C. § 2255 motion. *See United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999) (concluding an otherwise untimely amendment to a 28 U.S.C. § 2255 motion does not relate back to a timely filed motion when the original claims are distinctly separate from the claims in the amendment). *See also Mandacina v. United States*, 328 F.3d 995, 999-1000 (8th Cir. 2003) (citing *Craycraft*, 167 F.3d at 457); *Moore v. United States*, 173 F.3d 1131, 1135 (8th Cir. 1999) (discussing *Craycraft*, 167 F.3d at 456-57). Thus, Sturdy is procedurally barred from asserting his constitutional right to testify claim. *Cf. El-Tabech*, 997 F.2d at 389 (holding in the procedural default context that a claim charging the denial of the constitutional right to testify on one's own behalf "is wholly unrelated to the elements of an ineffective assistance of counsel claim"). Despite the fact that Sturdy did not raise the constitutional right to testify issue as a separate issue and the fact that 28 U.S.C. § 2255 bars Sturdy from asserting a new legal theory in a reply brief that is filed after the applicable statute of limitation has run, the court elects to discuss the merits of Sturdy's fundamental constitutional right to testify claim.

Criminal defendants have a constitutional right to testify in their own defense. *See Rock v. Arkansas*, 483 U.S. 44, 49-53, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (holding a per se rule excluding hypnotically refreshed testimony impermissibly infringed on a defendant's right to testify under the Fifth, Sixth and Fourteenth Amendments). "'Because the right to testify is a fundamental constitutional guarantee, only the defendant is empowered to waive the right.'" *Frey*, 151 F.3d at 898 (quoting

Bernloehr, 833 F.2d at 751). *See also Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (stating "ultimate authority" to decide whether to testify rests with the defendant).

When addressing a defendant's decision to waive his right to testify, the court makes a factual determination about whether conduct exists concerning waiver and a legal determination about whether such conduct results in a waiver. *Frey*, 151 F.3d at 898. Whether trial counsel advised the defendant about his right to testify and whether he accepted the recommendation not to testify are findings of fact. *Id.*

> [A] knowing and voluntary waiver of the right [to testify] may be found based on a defendant's silence when his counsel rests without calling him to testify . . . . under such circumstances, the defendant must act 'affirmatively' rather than apparently 'acquiescing in his counsel's advice that he not testify, and then later claiming that his will to testify was overcome.'

Frey, 151 F.3d at 898 (internal citations omitted). Where a defendant fails to affirmatively act at the appropriate time, a knowing and voluntary waiver of the right to testify is deemed to have occurred. *See e.g., Bernloehr*, 833 F.2d at 752 (concluding the defendant waived his right to testify because he made no objection when his counsel rested without calling him.)

Here, nothing in the record suggests that Sturdy felt he did not have a choice in testifying, believed the decision to testify was completely trial counsel's decision to make or thought trial counsel coerced him into not testifying. The record, however, does indicate:

(1) Sturdy was present during the final pretrial conference when trial counsel and the court discussed the possibility of Sturdy taking the stand to testify;

(2) Sturdy stipulated that he was a convicted felon to avoid presentation of his criminal record;

(3) Sturdy was present during the third day of trial when trial counsel addressed the witnesses Sturdy intended to call, when the government asked whether Sturdy was going to testify, when trial counsel indicated a decision regarding Sturdy's testimony had not been made and when the court directed Sturdy to make a decision as to whether he was going to testify by the afternoon;

(4) Sturdy informed trial counsel that he did not believe it was a good idea to testify at trial and trial counsel agreed that Sturdy should not testify because testimony regarding his criminal history would harm his chances of being acquitted;

(5) Sturdy was present on the afternoon of the third day of trial when trial counsel addressed the witnesses Sturdy intended to call;

(6) Sturdy changed his mind, decided to testify and made his desire to testify known to trial counsel;

(7) Trial counsel did not call Sturdy to testify;

(8) Sturdy remained silent when trial counsel rested the case without calling him to testify even though he had previously brought numerous issues to the court's attention, including specific issues regarding his counsel's effectiveness;

(9) Sturdy remained silent about his desire to testify even though new counsel represented him post-trial and the court gave Sturdy an opportunity to make lengthy statements during several post-trial proceedings; and

(10) Sturdy remained silent about his desire to testify when new counsel represented him on direct appeal.

Based on the record, it is clear trial counsel advised Sturdy about his right to testify and Sturdy accepted trial counsel's recommendation not to testify. Moreover, it is clear Sturdy, after apparently acquiescing in trial counsel's advice that he not testify, never affirmatively acted to indicate he wanted to testify after trial counsel rested. *Cf. Bernloehr*, 833 F.2d at 752 (concluding the defendant voluntarily and intelligently waived his constitutional right to testify). Thus, Sturdy's conduct constituted waiver.

In light of the preceding discussion, the court concludes it is not appropriate to issue a certificate of appealability regarding Sturdy's first issue.

2. The Remaining Three Issues

In its January 23, 2004 order, the court thoroughly discussed Sturdy's remaining three issues. The court denied relief on those issues because the allegations Sturdy offered were contradicted by the record, inherently incredible, or conclusions rather than statements of fact. In his motion for a certificate of appealability, Sturdy offers the same type of allegations. Based on the record, the court is convinced Sturdy has not "demonstrat[ed] that jurists of reason could disagree with the district court's

resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Accordingly, the court concludes it is not appropriate to issue a certificate of appealability regarding Sturdy's remaining three issues.

II. CONCLUSION

In sum, Sturdy fails to meet the standards set forth for the issuance of a certificate of appealability. Having thoroughly reviewed the record in this case, the court finds Sturdy fails to make the requisite "substantial showing" with respect to all of the claims he raised in his 28 U.S.C. § 2255 motion. *See* 28 U.S.C. §2 253(c)(2); Fed. R. App. P. 22(b). Because he did not present questions of substance for appellate review, Sturdy's request for a certificate of appealability shall be denied. If Sturdy desires further review of his 28 U.S.C. § 2255 motion, he may request issuance of the certificate of appealability by a circuit judge of the United States Court of Appeals for the Eighth Circuit in accordance with *Tiedeman*, 122 F.3d at 520-22. The Clerk of Court shall forward this matter to the Eighth Circuit Court of Appeals for further disposition.

In light of the foregoing, IT IS ORDERED:

1) The defendant's motion for a certificate of appealability (docket no. 282) is denied.

2) The Clerk of Court is directed to forward this matter to the Eighth Circuit Court of Appeals for further disposition.

IT IS SO ORDERED.

DATED this 25th day of March, 2004.

/s/ Linda R. Reade
LINDA R. READE
JUDGE,
U.S. DISTRICT COURT
NORTHERN DISTRICT
OF IOWA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA EASTERN-WATERLOO DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ROBERT KYE STURDY, Defendant.	No. CR97-2002-LRR No. C01-2016-LRR **ORDER**

This matter comes before the court on Defendant Robert Kye Sturdy's ("Sturdy") motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (docket no. 254) and Sturdy's motion to supplement (docket no. 259). Also before the court is the government's motion for a ruling on Sturdy's 28 U.S.C. § 2255 motion (docket no. 274).

I. BACKGROUND

On February 21, 1997, the government filed an indictment against Sturdy. On April 28, 1997, the court arraigned Sturdy.[1] On April 30, 1997, the court conducted a detention hearing and ordered Sturdy be detained pending trial.[2] On May 14, 1997, the government filed a

[1] At the arraignment, Paul Papak represented Sturdy. Paul Papak represented Sturdy until April 30, 1997.

[2] On April 30, 1997, Jane Kelly entered an appearance on behalf of Sturdy. Jane Kelly represented Sturdy from April 30, 1997 to July 3, 1997.

superceding indictment. On May 16, 1997, the government filed a statement pursuant to Local Rule 25(b). On May 19, 1997, Sturdy filed a motion to dismiss the charges in the indictment. On May 23, 1997, the court arraigned Sturdy on the additional count contained in the superceding indictment. On May 29, 1997, Sturdy filed two briefs in support of his motion to dismiss. In his first brief, Sturdy argued the charges should be dismissed based on pre-indictment delay. In his second brief, he argued the charges should be dismissed based on a violation of Federal Rule of Civil Procedure 5(a). On June 5, 1997, the government resisted Sturdy's motion to dismiss. On June 18, 1997, the government filed a second superceding indictment and a statement pursuant to Local Criminal Rule 7.1. On June 25, 1997, Sturdy filed a motion for appointment of new counsel. On July 3, 1997, the court granted Sturdy's motion for appointment of new counsel.[3] On the same day, the court entered an order denying Sturdy's motion to dismiss the charges contained in the indictment. On July 31, 1997, Sturdy filed a motion to dismiss based on an illegally constituted grand jury. On August 13, 1997, the government resisted such motion. On August 15, 1997, Sturdy filed a brief in support of his motion to dismiss. On August 18, 1997, the government filed a brief in support of its resistance. On September 17, 1997, Sturdy filed a motion to dismiss the indictment due to destruction of evidence and a brief supporting such motion. On September 29, 1997, the government resisted Sturdy's motion to dismiss. On October 6, 1997, the

[3] On July 10, 1997, the court entered an order appointing Charles Nadler to represent Sturdy. On July 24, 1997, Charles Nadler entered an appearance on behalf of Sturdy. Charles Nadler represented Sturdy until December 18, 1997.

government filed a third superceding indictment. The third superceding indictment charged Sturdy with the following-four counts:

> 1) knowingly and intentionally possessing with intent to distribute 10 grams or more of actual methamphetamine, a Schedule II controlled substance in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B)(viii);
>
> 2) knowingly and intentionally possessing with intent to distribute a mixture or substance containing marijuana, a Schedule I controlled substance in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(D);
>
> 3) knowingly carrying a firearm, a loaded 9mm semi-automatic pistol, during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c); and
>
> 4) knowingly possessing, in and affecting commerce, a firearm, a loaded 9mm semi-automatic pistol, having been convicted of one or more crimes punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e).

On October 10, 1997, the government filed a statement pursuant to Local Criminal Rule 7.1. On October 27, 1997, the court arraigned Sturdy on the additional count contained in the third superceding indictment. On November 14, 1997 and November 19, 1997, Sturdy filed a motion for appointment of new counsel. On November 19, 1997, Sturdy also filed a motion to dismiss the indictment based on prosecutorial misconduct and a brief supporting such motion. On November 24, 1997, the government resisted such motion. On December 3, 1997, the court denied

Sturdy's motion for appointment of new counsel. On December 18, 1997, Sturdy filed an amendment to his motion to dismiss based on destruction of evidence and a motion for appointment of new counsel. On the same day, the court granted Sturdy's motion for appointment of new counsel.[4] On December 30, 1997, the government resisted Sturdy's amendment to his motion to dismiss. On January 1, 1998, the government filed a brief supporting such resistance. On April 16, 1998, the court held a hearing and denied all of Sturdy's pending motions to dismiss.

On April 21, 1998, Sturdy's jury trial commenced. On the same day, Sturdy filed a motion for appointment of new counsel. Sturdy subsequently withdrew such motion. On April 24, 1998, the jury found Sturdy guilty of each count contained in the third superceding indictment. On April 30, 1998, Sturdy filed a motion for appointment of new counsel. On May 1, 1998, Sturdy filed a motion for judgment of acquittal and a motion for a new trial. On the same day, the court granted Sturdy's motion for new counsel.[5] On May 12, 1998, the government resisted Sturdy's motion for judgment of acquittal and motion for a new trial. On September 4, 1998, Sturdy filed a brief supporting his motion for judgment of acquittal and motion for a new trial. On September 17, 1998, the government filed a brief supporting its resistance. On September 22,

---

[4] On December 18, 1997, the court appointed David Mullin to represent Sturdy. On December 22, 1997, David Muffin entered an appearance on behalf of Sturdy. David Mullin represented Sturdy until May 1, 1998.

[5] On May 5, 1998, the court appointed Thomas O'Flaherty to represent Sturdy. On May 11, 1998, Thomas O'Flaherty entered an appearance on behalf of Sturdy. Thomas O'Flaherty represented Sturdy until November 10, 1998.

1998, the government filed an amendment to such resistance. On October 20, 1998, Sturdy filed a motion to withdraw counsel. On October 27, 1998, the government resisted such motion. On November 2, 1998, Sturdy filed a response to the government's resistance. On November 6, 1998, the court granted Sturdy's motion to withdraw counsel.[6] On November 18, 1998, the court denied Sturdy's motion for judgment of acquittal and motion for a new trial. On December 10, 1998, defense counsel filed a status report regarding his relationship with Sturdy. On December 15, 1998, the court denied Sturdy's request for a new attorney.

On January 25, 1999, Sturdy appeared for his scheduled sentencing hearing. Based on a total offense level of 37 and a criminal history category of VI, the court determined Sturdy's sentencing range to be between 360 months and life.[7] The court sentenced Sturdy to 600

---

[6] On November 13, 1998, Mark Brown entered an appearance on behalf of Sturdy. It appears Mark Brown represented Sturdy until approximately January 27, 1999.

[7] U.S.S.G. § 2D1.1 is the corresponding sentencing guideline for count one (a drug offense) and count two (a drug offense). Pursuant to U.S.S.G. § 2D1.1, the base offense level for count one and count two is 28. Pursuant to U.S.S.G. § 3C1.2, it is appropriate to add two levels because Sturdy engaged in reckless endangerment during flight. The adjusted offense level for count one and count two is 30. U.S.S.G. § 2K2.1 is the corresponding sentencing guideline for count four (an armed career criminal offense). Pursuant to U.S.S.G. § 2K2.1(a)(2), the base offense level is 24. Pursuant to U.S.S.G. § 2K2.1(b)(4), it is appropriate to add four levels because Sturdy possessed a firearm in connection with a different felony offense. The adjusted offense level for count four is 28. Regarding count three (a carrying a firearm offense), U.S.S.G. § 2K2.4 is the corresponding sentencing guideline. Pursuant to U.S.S.G. § 2K2.4, count three is punishable by a mandatory 240 months imprisonment because of Sturdy's prior conviction under 18 U.S.C. § 924(c). In addition, such imprisonment must run consecutively with

(Continued on following page)

months imprisonment. The court reached such sentence by adding the 360 month sentence imposed for count one (methamphetamine) and count four (armed career criminal) to the 240 month sentence imposed for count three (carrying a firearm). The court ordered the 120 month sentence imposed for count two (marijuana) to run concurrently to the sentence imposed for count one and count four. The court entered judgment against Sturdy the same day.

On January 27, 1999, Sturdy appealed his conviction. On appeal, Sturdy challenged the sufficiency of the evidence used to convict him and the 21-month delay between his arrest and his indictment.[8] On March 16, 2000, the Eighth Circuit Court of Appeals affirmed Sturdy's conviction.[9]

On March 6, 2001, Sturdy filed the instant motion.[10] In his 28 U.S.C. § 2255 motion, Sturdy raises several

---

any other term of imprisonment. U.S.S.G. § 4B1.1 applies to defendants who are career offenders. It is appropriate to apply U.S.S.G. § 4B1.1(A) because Sturdy qualifies as a career offender and count one carries a maximum term of life imprisonment. Based on those sentencing guidelines, the court determined Sturdy's total offense level to be 37. Utilizing U.S.S.G. § 4A1.1, U.S.S.G. § 4B1.1 and U.S.S.G. § 4B1.4, the court determined Sturdy's criminal history to be VI.

[8] On appeal, Thomas Ochs presented argument on behalf of Sturdy.

[9] *See United States v. Sturdy,* 207 F.3d 448 (8th Cir. 2000).

[10] If a prisoner is in custody pursuant to a sentence imposed by a federal court and such prisoner claims "that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, [the prisoner] may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. *See also Daniels v. United States,* 532 U.S. 374, 377 (2001).

arguments challenging his conviction and resulting sentence based on *Apprendi*[11] and ineffective assistance of counsel. With regard to the latter, Sturdy contends he was denied effective assistance because counsel: 1) created an irreconcilable conflict of interest; 2) denied him his right to testify; 3) failed to object to a jury instruction regarding intent; 4) failed to investigate, subpoena witnesses and prepare for trial; 5) failed to present evidence of actual innocence; and 6) failed to raise claims one through five on direct appeal. On April 2, 2001, Sturdy filed a motion to supplement his 28 U.S.C. § 2255 motion. The Court grants this motion. The government fairly characterizes the allegations of error contained in the supplement as additional ineffective assistance of counsel claims and fairly summarizes such claims as follows: 1) *Apprendi* dictates a reversal of his sentence; 2) 18 U.S.C. § 924(c)(1) is unconstitutionally vague, requiring the rule of lenity to be applied; 3) 18 U.S.C. §§ 922(g)(1) and 924(c)(1) are duplicitous, violating the double jeopardy clause of the United States Constitution; 4) the government may not utilize both the career offender and armed career criminal enhancements in a single indictment; 5) Sturdy was not a career offender because he did not have two qualifying convictions for crimes of violence; 6) Sturdy was not an armed career criminal because he did not have four prior qualifying crimes of violence; and 7) U.S.S.G. Amendment 599 should have been retroactively applied to this case. On August 27, 2001, the government resisted Sturdy's 28

---

[11] *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that, with the exception of prior convictions, any fact that increases the maximum penalty for a crime beyond the prescribed statutory maximum penalty for such crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt).

U.S.C. § 2255 motion and supplement. On October 5, 2001, Sturdy filed a reply. On September 11, 2002, the government filed a motion for a ruling on Sturdy's 28 U.S.C. § 2255 motion. The Court grants the government's motion. Accordingly, the court turns to consider those claims contained in Sturdy's 28 U.S.C. § 2255 motion and supplement.

II. ANALYSIS

A. Standard Applicable to 28 U.S.C. § 2255 Motion

The Eighth Circuit Court of Appeals described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States,* 810 F.2d 817, 821 (8th Cir. 1987). With regard to its purpose, the Eighth Circuit Court of Appeals stated:

> [28 U.S.C. § 2255] provides remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was "imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."

Id. (quoting 28 U.S.C. § 2255). Although it appears to be a broad remedy, a motion under 28 U.S.C. § 2255 is limited. Because a final judgment commands respect, "[r]elief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel,* 97 F.3d

1074, 1076 (8th Cir. 1996). *See also Poor Thunder,* 810 F.2d at 821-22 (While a direct appeal is the exclusive route for complaining about trial errors significant enough to require reversal, 28 U.S.C. § 2255 is intended to rectify "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure."). Stated differently, a collateral challenge under 28 U.S.C. § 2255 is not interchangeable with or a substitute for a direct appeal, and "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *United States v. Frady,* 456 U.S. 152, 164-65 (1982) (citation omitted). In sum, "to obtain collateral relief, a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *Id.* at 166. Specifically, "a convicted defendant must show both (1) 'cause' excusing his [or her] double procedural default, and (2) 'actual prejudice' resulting from the errors of which he [or she] complains." *Id.* at 167-68.

B. Evidentiary Hearing

A district court is given discretion in determining whether to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255. *See United States v. Oldham,* 787 F.2d 454, 457 (8th Cir. 1986). In exercising that discretion, the district court must determine whether the facts alleged, if true, would entitle the movant to relief. *See Payne v. United States,* 78 F.3d 343, 347 (8th Cir. 1996).

"Accordingly, [a district court may summarily dismiss a motion brought under 28 U.S.C. § 2255 without an evidentiary hearing] if (1) the . . . allegations, accepted as true, would not entitle the [movant] to relief, or (2) the

allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Engelen v. United States,* 68 F.3d 238, 240-41 (8th Cir. 1995) (citations omitted). Stated differently, a 28 U.S.C. § 2255 motion can be dismissed without a hearing where "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. *See also Standing Bear v. United States,* 68 F.3d 271, 272 (8th Cir. 1995) (per curiam).

The court's review of the record leads it to conclude it is able to resolve Sturdy's *Apprendi* claims and ineffective assistance of counsel claims from the record. Thus, there is no need for an evidentiary hearing. *See Rogers v. United States,* 1 F.3d 697, 699 (8th Cir. 1993). (holding "[a]ll of the information that the court needed to make its decision with regard to [the petitioner's] claims was included in the record. . . . " and therefore the court "was not required to hold an evidentiary hearing") (citing Rule Governing Section 2255 Proceedings 8(a) and *United States v. Raddatz,* 447 U.S. 667, 674 (1980)). The evidence of record conclusively demonstrates that Sturdy is not entitled to the relief sought. Specifically, the record indicates Sturdy's allegations regarding his *Apprendi* claims and ineffective assistance of counsel claims are wholly without merit. As such, the court finds that there is no need for an evidentiary hearing.

C. Apprendi

In his 28 U.S.C. § 2255 motion, Sturdy contends his conviction and sentence were rendered in violation of his Fifth Amendment right to due process and his Sixth

Amendment right to proper notice and jury trial guarantee. To support such contention, Sturdy states: (1) count one of the third superceding indictment charged only 10 grams of actual methamphetamine, but the court attributed to Sturdy 63.54 grams of actual methamphetamine at sentencing; and (2) count two of the third superceding indictment did not charge a specific quantity of marijuana, but the court attributed to Sturdy 3.2 kilograms of marijuana at sentencing. Based on such facts, Sturdy argues the government's failure to charge a specific quantity in the third superceding indictment denied Sturdy his fundamental rights under the Fifth and Sixth Amendments. As a result, Sturdy urges the court to vacate his convictions under count one and count two of the third superceding indictment under the United States Supreme Court's decision in *Apprendi.*

In *Apprendi,* the Supreme Court held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *See also United States v. Aguayo-Delgado,* 220 F.3d 926, 933-34 (8th Cir. 2000) (holding that, in the context of quantity-dependent sentencing scheme under 21 U.S.C. § 841, *Apprendi* prohibits the government from seeking to impose a sentence in excess of 21 U.S.C. § 841(b)(1)(C)'s 20 year-maximum sentence unless drug quantity is both alleged in the indictment and found beyond a reasonable doubt by a jury). The Eighth Circuit Court of Appeals held in *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001), *cert. denied,* 534 U.S. 1097 (2002), that the Supreme Court did not make its decision in *Apprendi* retroactively applicable to cases on collateral review and, further, that an *Apprendi*

claim cannot be raised on collateral review. The Supreme Court issued its *Apprendi* decision on June 26, 2000. Sturdy was sentenced on January 25, 1999. The Eighth Circuit Court of Appeals affirmed Sturdy's conviction on March 16, 2000. *See United States v. Sturdy,* 207 F.3d 448 (8th Cir. 2000). The court therefore finds Sturdy's contention that his conviction and sentencing should be vacated in light of *Apprendi* is without merit.[12]

D. Ineffective Assistance of Counsel

In his 28 U.S.C. § 2255 motion, Sturdy claims that he received ineffective assistance of counsel at the trial and appellate level. The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [or her] defense." U.S. Const., Amend. VI. Furthermore, criminal defendants have a constitutional right to effective assistance of counsel in their first appeal. *Evitts v. Lucey,* 469 U.S. 387, 393-95 (1985); *Douglas v. California,* 372 U.S. 353, 356-57 (1963).

The Sixth Amendment right to effective counsel is clearly established. *See Strickland v. Washington,* 466 U.S. 668 (1984). In *Strickland,* the United States Supreme Court explained that a violation of that right has two components:

---

[12] In light of the court's holding that *Apprendi* does not apply to this case, the court declines to address Sturdy's ineffective assistance of counsel claim based on *Apprendi* or any other claim that he is entitled to relief based on *Apprendi.*

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. *See also Williams v. Taylor,* 529 U.S. 362, 390 (2000) (reasserting *Strickland* standard). Thus, *Strickland* requires a showing of both deficient performance and prejudice. However, "a court deciding an ineffective assistance claim need not address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland,* 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on grounds of lack of sufficient prejudice, . . . that course should be followed." *Id. See also United States v. Apfel,* 97 F.3d at 1076 ("[A court] need not address the reasonableness of the attorney's behavior if the movant cannot prove prejudice.").

To establish unreasonably deficient performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. The "reasonableness of counsel's challenged conduct [must be reviewed] on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. There is a strong presumption of competence and reasonable professional judgment *Id. See also United States v. Taylor,* 258 F.3d 815, 818 (8th Cir. 2001) (operating on the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance") (quoting *Strickland,* 466 U.S. at 689); *Sanders v.*

Trickey, 875 F.2d 205, 210 (8th Cir. 1989) (broad latitude to make strategic and tactical choices regarding the appropriate action to take or refrain from taking is afforded when acting in a representative capacity) (citing *Strickland,* 466 U.S. at 694). In sum, the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Strickland,* 466 U.S. at 690.

To establish prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In other words, "the question is whether there is a reasonable probability that, absent those errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 695. In answering that question, the court "must consider the totality of the evidence before the judge or jury." *Id.*

Having laid out the appropriate standard, the court now addresses those grounds which allegedly constitute ineffective assistance of counsel.

1. Ineffective Assistance Due to Conflict of Interest

Sturdy first asserts he was denied effective assistance because trial counsel inadequately prepared for trial. Sturdy also argues he was denied effective assistance because trial counsel did not investigate Sturdy's case or interview enough witnesses. Sturdy further alleges that he

informed the court on the second day of trial he was dissatisfied with the performance of trial counsel because trial counsel was not sufficiently cross-examining witnesses and did not adequately investigate his case in preparation for trial. Sturdy alleges he also informed the court trial counsel had failed to continue to use the services of a private investigator. Sturdy states the court treated Sturdy's complaints as a motion for a mistrial, declined to grant a mistrial and instead insisted that Sturdy go ahead with trial using the same trial counsel. Sturdy asserts the court erred in forcing him to stand trial represented by an attorney with whom he was "embroiled in an irreconcilable conflict of interest" Sturdy renewed his motion for new counsel on April 30, 1998. Sturdy admits in the instant motion that he never presented to the court a full explanation of the reasons for which he was dissatisfied with his trial counsel because the court failed to sufficiently inquire into Sturdy's complaints.

The court has reviewed the record and concludes trial counsel's performance was not ineffective simply because he failed to investigate Sturdy's case or to interview and cross-examine witnesses in the way in which Sturdy desired. Even if Sturdy were able to show trial counsel's performance was deficient, the court finds Sturdy has failed to make a showing that he was prejudiced by trial counsel's performance because Sturdy has offered no evidence which supports such a position. Sturdy's allegations that "prejudice should be presumed in the instant case due to the magnitude of irreconcilable differences between counsel and Sturdy . . . [and] once Sturdy complained to the court he was dissatisfied with his attorney Sturdy was without counsel, and an actual conflict of interest existed," insufficient to establish prejudice. The

court therefore finds Sturdy's ineffective assistance claim in this regard to be without merit.

2. Ineffective Assistance Due to Failure to Allow Sturdy to Testify

Sturdy next alleges trial counsel was ineffective because trial counsel refused to allow him to testify in his own defense. Sturdy admits he and his trial counsel agreed at the outset that, given his extensive criminal history, it would not be a good idea for Sturdy to testify at trial. Sturdy contends, however, it became clear his testimony was necessary after he heard the government's evidence, but trial counsel refused to allow him to testify in his own defense. Sturdy contends his testimony was crucial to his defense because it would have been consistent with his defense strategy that he was charged with the crimes at issue because of a case of mistaken identity. Sturdy further asserts his testimony would have called to the jurors' attention the government's inconsistent evidence. Sturdy asserts he would have testified to the following: he was not the driver of the van – it was the Brian Russell with whom he and his female companion allegedly were traveling who was the driver; the drugs and weapon did not belong to him and he did not throw these items from the van; he did not register the motel room at the Excel Inn using the stolen identification from Bryan Russell; the real Bryan Russell was not the person he knew to be Bryan Russell; Officer Meyers had smashed his knee in Sturdy's lower back fracturing a vertebrae and therefore his injuries were not sustained from the crash; it was the alias Bryan Russell (the individual who Sturdy contends actually committed the crimes with which Sturdy was charged) who had left the motel in the van; he had

spoken to Bryan Russell in the driveway at 726 W. Mullin; it was Bryan Russell, and not him, who got into the van and drove away from the address while he got back into the car with Melissa and Jaime; Bryan Russell was the person he saw jump out of the van at 700 W. 4th Street in Waterloo and run away from the crash; he had two prescription pill bottles in his name in the motel table drawer; and the cell phone, mini cassette player and scanner all were used as tools of his trade and these items were at the motel room not to facilitate a drug transaction but to further his work as a courier.

The court's review of the record reveals no evidence from which it could conclude that Sturdy made known to trial counsel his desire to testify and that trial counsel actively prohibited Sturdy from testifying at trial. Instead, the record reveals that Sturdy and trial counsel agreed he would not testify at trial given his lengthy criminal history and the risk that such history would be revealed to the jury on cross-examination. It is the court's view that trial counsel's decision not to have Sturdy testify at trial constitutes reasonable trial strategy under the circumstances. As the Supreme Court recognized in *Strickland,* 466 U.S. at 689, courts reviewing counsel's performance on an ineffective assistance claim must be highly deferential. Such deference is appropriate because it "is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* Thus, there is a strong presumption that trial counsel's actions constituted reasonable trial strategy, *see id.,* and Sturdy has not adduced evidence sufficient to overcome this presumption.

Moreover, even if Sturdy had succeeded in showing that trial counsel's decision not to have him testify on his own behalf qualifies as deficient performance, Sturdy is unable to show that he was prejudiced by trial counsel's performance in this regard. The court finds Sturdy's assertions that his testimony would have changed the outcome of his trial are insufficient to establish prejudice in this case given the overwhelming evidence of his guilt adduced at trial.

3. Ineffective Assistance Based on Failure to Object to Instruction on Intent

Sturdy next argues trial counsel was ineffective because he failed to object to the following instruction regarding intent:

> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done, but you are not required to do so. As I have said, it is entirely up to you to decide what facts to find from the evidence.

Sturdy relies on the Supreme Court's decision in *Sandstorm v. Montana*, 442 U.S. 510 (1979), in support of his argument that this instruction impermissibly shifted the burden of proof to the defense and therefore his trial counsel's failure to object to this instruction rendered trial counsel's performance ineffective.

The court is unconvinced by Sturdy's argument. The jury instruction the Supreme Court found to be in violation of the defendant's Fourteenth Amendment rights in *Sandstorm* stated, "[t]he law presumes that a person intends the consequences of his voluntary acts." The

Supreme Court held this instruction was constitutionally invalid because the jury may have interpreted such instruction as "constituting either a burden-shifting presumption . . . or a conclusive presumption . . . and . . . either interpretation would have deprived defendant of his right to the due process of law." 442 U.S. at 524 The court finds the jury instruction at issue does not have the effect of shifting the burden of proof to Sturdy or of creating a conclusive presumption on the element of intent. The instruction at issue does not state that the law presumes anything or that the jury was required to find anything with respect to Sturdy's intent. Accordingly, the court is unable to conclude that trial counsel was ineffective or that Sturdy was prejudiced by trial counsel's performance in this regard.

4. Ineffective Assistance for Failure to Call Witnesses on Sturdy's Behalf at Trial and Failure to Investigate

Sturdy next argues trial counsel's failure to investigate and to subpoena Jane Lynch, Dennis O'Brien and Thomas Settles to testify at trial denied him the right to prove his actual innocence of the crime charged and therefore rendered trial counsel's performance constitutionally deficient. Sturdy asserts Lynch would have testified Sturdy was not the Bryan Russell for whom she rented the white van. Given such testimony, Sturdy contends it would have been "establish[ed] to the jury that there was someone other than Sturdy claiming to be [Bryan] Russell." Sturdy contends O'Brien would have proffered testimony that he was not at O'Brien's residence on the evening in question, which is contrary to the evidence the government presented on this issue. Finally,

Sturdy asserts Settles would have "testified that [Sturdy] was not the person who stole [Settles'] firearm that was found in the bag thrown from the van."

The court's review of the record leads it to conclude that trial counsel's decision not to call Lynch, O'Brien or Settles constitutes reasonable trial strategy. Sturdy's defense at trial was that a Bryan Russell, with whom Sturdy and his friend Jaime Maggard had traveled to Waterloo from Texas, was the person who was driving the van during the police surveillance and the chase of the vehicle. At trial, Sturdy sought to present evidence that it was this Bryan Russell and not Sturdy who was guilty of the crimes for which Sturdy was charged. Maggard testified at trial that there was someone other than Sturdy claiming to be Bryan Russell. Consequently, it was reasonable for trial counsel to make the decision not to call Lynch to testify again about this issue. Further, given Sturdy's theory of defense, neither O'Brien's nor Settles' testimony was critical to the success of Sturdy's defense. Accordingly, trial counsel's decision not to call these witnesses does not constitute ineffective assistance. Moreover, even if trial counsel's performance had been deficient, the court finds Sturdy has presented no evidence from which the court could conclude that Sturdy was prejudiced by trial counsel's failure to call additional witnesses. The court notes there is ample evidence to support Sturdy's conviction in the record. The government presented overwhelming evidence that Sturdy was driving the van and that Sturdy possessed the drugs and firearm the police found in the duffel bag thrown from the van during the chase. Trial in this matter lasted three days. The government called thirteen witnesses to testify and Sturdy called eight witnesses to testify. The trial transcript is over

six-hundred pages. Sturdy's contention that he was prejudiced by his trial counsel's decision not to call the three witnesses in question simply is without merit.

The court has reviewed Sturdy's argument that trial counsel was ineffective because he failed to sufficiently investigate Sturdy's case and failed to discover what Sturdy now asserts to be newly acquired evidence of his actual innocence (but which Sturdy also states would have been readily available to trial counsel). The court declines to address Sturdy's argument in this regard because it is wholly without merit.

5. Ineffective Assistance by Appellate Counsel

Having concluded Sturdy's ineffective assistance of trial counsel claims are devoid of merit, the court finds failure by appellate counsel to raise these claims on appeal does not constitute ineffective assistance. *See Williams v. Kemna,* 311 F.3d 895, 897 (8th Cir. 2002) (recognizing "[t]he Sixth Amendment does not require that appellate counsel raise every colorable or non-frivolous issue on appeal" because effective appellate advocacy often involves screening out weaker claims) (quoting *Roe v. Delo,* 160 F.3d 416, 418 (8th Cir. 1998)).

6. Ineffective Assistance for Failure to Raise Sentencing Issues

Sturdy maintains he was denied the right to the effective assistance of counsel in connection with his sentencing because trial counsel failed to raise several challenges to Sturdy's sentence and appellate counsel failed to raise such challenges on appeal. Sturdy first argues trial and appellate counsel should have contended

the ambiguous language of 18 U.S.C. § 924(c)(1) requires that the court negate his twenty-year enhanced sentence. Sturdy argues that "the charge of 924(c)(1) is restricted to crimes of conviction in the courts of the United States, not State Courts." The court notes Sturdy's prior firearm conviction upon which the twenty-year enhanced sentence is based is a federal crime of which Sturdy was convicted in federal court. Thus, any argument Sturdy's enhanced sentence was imposed in error is without merit. Further, the court concludes trial counsel's decision not to make this argument at sentencing and appellate counsel's decision not to make this argument on appeal were reasonable decisions and Sturdy's ineffective assistance claim in this regard must fail.

Sturdy next asserts that his trial and appellate counsel rendered ineffective assistance by failing to assert on Sturdy's behalf that his simultaneous convictions under 18 U.S.C. §§ 922(g)(1) and 924(c)(1) constitute "double jeopardy and a denial of due process, a constitutionally guaranteed right, that is protected" and therefore the court must dismiss count three of the indictment. At the time of Sturdy's sentencing, every circuit court that had addressed this argument had rejected it. *See, United States v. Johnson,* 977 F.2d 1360 (10th Cir. 1992); *United States v. Young,* 936 F.2d 1050, 1056 (9th Cir. 1991); *United States v. Lawrence,* 928 F.2d 36, 38 (2d Cir. 1990; *United States v. Garrett,* 903 F.2d 1105, 1114-15 (7th Cir. 1990); *United States v. Hayes,* 27 F.3d 568, 1994 WL 262055 (6th Cir. 1994) (unpublished decision).[13] The court

[13] The court notes the Eighth Circuit Court of Appeals also explicitly rejected this argument in *United States v. Jones,* 266 F.3d 804, 813 (8th Cir. 2001). The *Jones* court held that the felony possession

(Continued on following page)

therefore finds trial and appellate counsel's decision not to assert this argument on Sturdy's behalf was reasonable and does not constitute ineffective assistance. Accordingly, the court rejects Sturdy's claim of ineffective assistance.

Sturdy's [sic] also argues trial and appellate counsel were ineffective because they failed to assert the following challenges to Sturdy's sentence: (1) inclusion of "Career Offender and Armed Career Criminal in the same indictment is inappropriate;" (2) of the four prior convictions relied upon by the court to substantiate Sturdy's career offender status, only Sturdy's robbery conviction was appropriate for the establishment of career offender status and the court therefore erred in considering all four prior convictions; and (3) the court erred in applying the armed career criminal charge using prior convictions that did not qualify to substantiate the application of the 18 U.S.C. § 924(e) enhancement of the 18 U.S.C. § 922(g)(1) offense. The court has reviewed the record regarding the sentence imposed upon Sturdy for the offenses set forth in counts one, two, three and four of the third superceding indictment and has determined Sturdy's arguments in this regard have no merit and therefore fail.

---

charge under 18 U.S.C. § 922(g)(1) requires proof of a previous felony, which is a fact not required for proving the crime of carrying a weapon during a narcotics transaction in violation of 18 U.S.C. 924(c). *Id.* Similarly, the crime of carrying a firearm during a narcotics transaction requires proof of guilt of the narcotics charge, a fact that is not necessary to establish the felony possession offense. *Id.* The court thus concluded that because each offense requires proof of fact which the other does not, the double jeopardy clause is not implicated when a defendant is charged with both offenses. *Id.*

III. CONCLUSION

In light of the foregoing, the court finds Sturdy's reliance on *Apprendi* for relief in his 28 U.S.C. § 2255 motion is inappropriate. The court also finds Sturdy's arguments regarding ineffective assistance of counsel in violation of the Sixth Amendment at both the trial and appellate levels to be wholly without merit. Given the number of attorneys appointed to represent Sturdy in this matter, it is highly unlikely there is any attorney who would have provided representation that Sturdy would have found to be satisfactory. Accordingly, IT IS ORDERED:

1. Sturdy's 28 U.S.C. § 2255 motion (docket no. 254) is denied.

2. Sturdy's motion to supplement his 28 § U.S.C. § 2255 motion (docket no. 259) is granted.

3. The government's motion for a ruling on Sturdy's 28 U.S.C. § 2255 motion (docket no. 274) is granted.

4. All other pending motions (docket nos. 255, 256 and 257) are denied as moot.

IT IS SO ORDERED.

DATED this 23rd day of January, 2004.

/s/ Linda R. Reade
LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 99-1249

United States of America, Appellee,	*	Appeal from the United States District Court for the Northern District of Iowa
v.	*	
Robert Kye Sturdy Appellants.	*	

Submitted: December 14, 1999

Filed: March 16, 2000

Before BEAM, Circuit Judge, HEANEY, Senior Circuit Judge, and KYLE, District Judge.[1]

KYLE, District Judge.

On April 24, 1998, a jury convicted Robert Kye Sturdy ("Sturdy") of possession with intent to distribute methamphetamine, possession with the intent to distribute marijuana, carrying a firearm during and in relation to a drug trafficking offense, and possession of a firearm as a previously

---

[1] The HONORABLE RICHARD H. KYLE, United States District Judge for the District of Minnesota, sitting by designation.

convicted felon. The district court[2] sentenced Sturdy to a term of imprisonment of 600 months. On appeal, Sturdy challenges the sufficiency of the evidence used to convict him and the 21-month delay between his arrest and his indictment. We affirm.

I. Background

On May 17, 1995, Special Agent Scott Gray ("Gray") of the FBI received a call from Bill Price ("Price"), a resident of Waterloo, Iowa, who stated that Sturdy had been to his house that afternoon offering to sell methamphetamine and marijuana. Price provided a description of Sturdy, and also told Gray that Sturdy was driving a white van with Texas license plates and staying at a hotel in the area. Gray searched for the vehicle and found a white van with Texas plates at a Waterloo motel. Gray and Investigator John Pederson ("Pederson") began surveillance of the van. That evening, Gray and Pederson observed the van leaving the parking lot. In separate vehicles, the agents followed the van until it turned off a main highway. Gray and Pederson broke off their surveillance of the van by continuing along the highway. As Pederson drove past the van, he observed the driver as a white male with short blonde hair and glasses. This agent later identified Sturdy as the driver when Sturdy was arrested that night.

After the van turned, Special Agent Mark Terra ("Terra") assumed surveillance of the van. Terra observed the driver of the van as the van approached his position, and later identified Sturdy as the driver. Terra followed

---

[2] The HONORABLE MICHAEL J. MELLOY, Chief Judge, United States District Judge for the Northern District of Iowa.

the van to a residential address in Waterloo, where it stopped. At that point, Terra turned over the surveillance to investigators Mark Meyer and Randall Hammitt. This team followed the van for a few blocks after it left the residence, and requested that a marked squad car make a traffic stop of the van. During the traffic stop, the driver refused to obey the patrolman's commands and sped away from the scene. Meyer testified that before the van left, he was able to see the driver's right profile. When Meyer arrested Sturdy later that evening, he recognized Sturdy as the van driver.

At least two police cars engaged in the chase of the van. At some point during the chase, officers saw the driver throw a duffel bag out of the van onto a residential driveway. The lead car alerted trailing cars of the bag's location, and a trailing team picked up the bag. An inventory of the bag revealed that it contained, among other items, approximately $20,000 in cash, a loaded handgun, a digital scale, quantities of methamphetamine and marijuana in cloth bags, two pages of Exel Inn notepaper containing a list of numbers with corresponding references to "pot," "speed," "van," "room," and "gas," and a prescription pill bottle bearing the name Robert Sturdy.

The chase ended after the van turned onto an unimproved road and crashed into a house. The pursuing officers, who had briefly lost sight of the van, exited their vehicles and ran to the driver's side of the van. Upon finding the van unoccupied, the officers began to search for the driver. Meyer found Sturdy running behind a house about a block and a half away and arrested him. A search of Sturdy's person revealed $2000 in cash, a telephone calling card in the name of Bryan Russell, credit cards in the name of Robert Sturdy, a date book, and paper with

numbers and terms on it. In addition, it was later determined that Sturdy had several cracked ribs. A search of the van produced a wallet with a driver's license, Social Security card, and credit cards for Robert Sturdy, and a Texas driver's license for Bryan Russell with the photograph cut out. Police also found additional drug paraphernalia and correspondence addressed to Robert Sturdy in the van.

Police continued the investigation at the motel where Gray first observed the white van. Investigators discovered that one of the rooms had made a phone call to Texas. The registration card for that room had been signed by a "Bryan Russell" and listed the license plate number of the van involved in the chase. Officers secured that room and obtained a search warrant.

When the police made contact with the occupants of the room, they encountered a woman who identified herself as "Christine Sage." Police later identified her as Jaime Maggard ("Maggard"). A search of the room produced a phone bill for Robert Sturdy, a cloth bag similar to the bags found in the duffel bag thrown from the van, various drug paraphernalia, a drugstore receipt for Robert Sturdy, and a notebook containing a marriage license, birth certificates, and stock certificates with the names covered in white-out and the names "Bryan Edward Russell" and "Christine Lynn Sage" written in.

At trial, the government elicited testimony from the law enforcement officers involved detailing the facts listed above. Additionally, the government presented the informant who Sturdy visited on May 17, 1995, and Bryan Edward Russell of Lone Oak, Texas, who testified that his truck and his wallet had been stolen in Texas about three

months before the incident. The defense called Bret Brown ("Brown"), an acquaintance of Sturdy, and Maggard as witnesses. Both witnesses testified that Sturdy and Maggard were in Waterloo with a "Bryan Russell" to purchase a van for Brown, and that this "Bryan Russell," not Sturdy, was driving the van during the police surveillance and chase of the vehicle. Maggard testified that Sturdy was with her and another friend, when they happened to pass the white van as it was being chased by police. According to Maggard, Sturdy was at the crash site because she and Sturdy followed the van in their vehicle and Sturdy ran to the van when he realized that it had crashed into a house.

II. Sufficiency of the Evidence

Sturdy has challenged the sufficiency of the evidence supporting his conviction. "In reviewing the sufficiency of the evidence to support a guilty verdict, we look at the evidence in the light most favorable to the verdict and accept as established all reasonable inferences supporting the verdict." *United States v. Davis,* 154 F.3d 772, 786 (8th Cir. 1998) (quoting *United States v. Plenty Arrows,* 946 F.2d 62, 64 (8th Cir. 1991)), *cert. denied,* 119 S.Ct. 1078 1090 (1999). "We will reverse only if 'no reasonable jury could have found the defendant guilty beyond a reasonable doubt.'" *United States v. Escobar,* 50 F.3d 1414, 1419 (8th Cir. 1995) (quoting *United States v. Frayer,* 9 F.3d 1367, 1371 (8th Cir. 1993)).

In this case, there is more than sufficient evidence to support the jury's verdict. Three law enforcement officers observed the driver at three different points in time – both before and after the van stopped at a house in Waterloo –

and subsequently identified Sturdy as the driver. Furthermore, the physical evidence obtained from searches of Sturdy, the van, and the motel room corroborated the officers' testimony that Sturdy was driving the van and the government's allegation that Sturdy was using the name "Bryan Russell" as an alias while in Waterloo, Iowa. Finally, the testimony of Bryan Russell cast substantial doubt on the version of events offered by Sturdy and the defense witnesses. Thus, ample evidence exists to support the jury's determination that Sturdy, not Bryan Russell, was driving the van, and that Sturdy possessed the drugs and firearm found in the duffel bag. Accordingly, we find that Sturdy's challenge to the sufficiency of the evidence is without merit.

III. Delay between arrest and sentencing

Sturdy also appeals his conviction based on the 21-month delay between his arrest and his arraignment on the charges presented at trial. The Due Process Clause of the Fifth Amendment protects a criminal defendant against unreasonable pre-indictment delay. *See United States v. Bartlett,* 794 F.2d 1285, 1289 (8th Cir. 1986). To prove a violation of his due process rights, Sturdy must establish that: (1) the delay resulted in actual and substantial prejudice to the presentation of the defense; and (2) the government intentionally delayed his indictment either to gain a tactical advantage or to harass him. *See United States v. Brockman,* 183 F.3d 891, 895 (8th Cir. 1999), *cert. denied,* 120 S. Ct. 800 (2000). The court will inquire into the reasons for delay only where actual prejudice has been established. *See United States v. Savage,* 863 F.3d 595, 598 (8th Cir. 1988). "To prove actual prejudice, a defendant must specifically identify witnesses

or documents lost during delay properly attributable to the government." *Bartlett,* 794 F.2d at 1290. It is not sufficient for a defendant to make speculative or conclusory claims of possible prejudice as a result of the passage of time. *See Brockman,* 183 F.3d at 895. Finally, it is the defendant's burden to show that the lost testimony or information is not available through other means. *See Bartlett,* 794 F.2d at 1290. In the instant case, the district court found that Sturdy failed to establish actual prejudice. We review the district court's decision for clear error. *See id.* at 1291 n.7.

Sturdy alleges that the delay prejudiced his defense because he was unable to locate the hotel clerk who could identify the person who rented the motel room searched by the police on May 17, 1995. The district court found this assertion of prejudice "extremely speculative." We agree. It was not clear error for the district to [sic] court to find speculative the prospect that the lost hotel clerk would have identified someone other than Sturdy, or, for that matter, anyone at all. Indeed, one of the motel clerks who did testify at trial stated that she rarely remembered any guests other than the motel's "regulars." Furthermore, Sturdy has failed to establish that this testimony was not available through other sources. *See Bartlett,* 794 F.2d at 1290. Maggard testified at trial that someone other than Sturdy rented the room in question, namely Bryan Russell. Thus, Sturdy was able to introduce evidence regarding the identity of the individual who rented the motel room despite the pre-indictment delay.

Because the lost testimony was both speculative and available through other sources, the district court did not commit clear error in holding that Sturdy had not met his burden of showing actual and substantial prejudice.

Accordingly, we affirm the denial of Sturdy's motion to dismiss for pre-indictment delay.

IV. Conclusion

For the reasons stated above, we affirm the judgment of the district court.

United States District Court
Northern District of Iowa

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
V.	(For Offenses Committed On or After November 1, 1987)
ROBERT KYE STURDY	CASE NUMBER: 6:97CR02002-001
	(Filed Mar. 2, 1999)
	Mark R. Brown Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

■ was found guilty on count(s) 1-4 of the 10/06/1997, after a plea of not guilty. Third Superseding Indictment

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §841(a)(1)	Possession With Intent to Distribute Methamphetamine	05/19/1995	1
21 U.S.C. §841(a)(1)	Possession With Intent to Distribute Marijuana	05/19/1995	2
18 U.S.C. §924(c)(1)	Using or Carrying a Firearm During and in Relation to a Drug Trafficking Crime	05/19/1995	3

18 U.S.C. §§922(g)(1), 924(a)(2) & 924(e)	Possession of a Firearm by a Felon	05/19/1995	4

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 483-74-0547

Defendant's Date of Birth: 08/26/1958

Defendant's USM No.: 18616-077

Defendant's Residence Address:

13932 Bee Street
Farmer's Branch,
Texas 75234

January 25, 1999
Date of Imposition of Judgment

/s/ Michael J. Melloy
Signature of Judicial Officer

Michael J. Melloy
Chief U.S. District Judge
Name & Title of Judicial Officer

January 25, 1999
Date

[STAMP]

Defendant's Mailing Address:
Same as above

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 600 months. This term consists of a 360 month term each for counts 1 & 4; a 120 month term for count 2, with these terms to run concurrently; and a 240 month term for count 3, to run consecutively to counts 1, 2 & 4.

■ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be placed at El Reno, OK, or USP Beaumont, TX, or as close to the Dallas, Texas, as possible, commensurate with his security classification, and that he participate in the Intensive Drug Treatment Program. The Court also recommends that he receive credit for time served in relation to this offense and that he receive good time credit.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
☐ at ____ a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 2-11-99 to FCC Beaumont (USP) at BM, TX, with a certified copy of this judgment.

Ernest J Chandler
~~UNITED STATES MARSHAL~~
Warden

By /s/ J Rogers, [Illegible]
~~Deputy U. S. Marshal~~ BOP

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 8 years. This term consists of an 8 year term for count 1; a 4 year term for count 2; a 3 year term for count 3; and a 5 year term for count 4, with all terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payment set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of testing bodily fluids and functions and treatment for drug and alcohol abuse as directed by his probation officer until such time as he is released from the program by his probation officer.

2. The defendant is prohibited from the use of alcohol and is prohibited from frequenting bars, taverns or other establishments whose primary source of income is derived from the sale of alcohol.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Count 1	$50.00	$	$
Count 2	$50.00		
Count 3	$50.00		
Count 4	$50.00		
Totals	$200.00		

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . .$ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ■ in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____ ; or

D ☐ in installments to commence ___ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U. S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ (*e.g., equal, weekly, monthly, quarterly*) installments of $ _____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

☐ Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

■ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): because the defendant qualifies as a career offender and an armed career criminal, the court need not make any findings on the remaining defendant objections.

Guideline Range Determined by the Court:

Total Offense Level: 37

Criminal History Category: VI

Imprisonment Range: 360 to life months

Supervised Release Range: 8 to life years

Fine Range: $20,000 to $4,500,000

■ Fine waived or below the guideline range because of inability to pay.

Total amount of Restitution: $_____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994, but before April 23, 1996, that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

■ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): the length of defendant's total sentencing package and the defendant's age.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

Approved as to form:

/s/ [Illegible]
U.S. Probation Officer

/s/ Steven M. Colloton
Assistant U.S. Attorney